

February 6, 2004

Dr. Steven O. Laing
Superintendent of Public Instruction
Utah State Office of Education
P. O. Box 144200
Salt Lake City, Utah 84114-4200

Dear Dr. Laing:

I am writing in response to your recent letter of January 12, 2004 to Secretary Paige regarding the consequences of potential nonparticipation by the State of Utah in the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB).

The ESEA provides very significant financial assistance and programs to help educate students in every State, including Utah. As you know, in 2003 Utah received about \$107 million in state-administered formula grants under the ESEA. These funds supplement the ongoing efforts of parents, teachers, and principals to help Utah's students meet the academic achievement standards Utah has established for its students. Federal funds under these programs focus especially on students with special needs, including students from low-income families, limited English proficient students, Native American students, and migrant students. While it is clear that it is strictly up to Utah to decide to utilize or forfeit these resources, we urge leaders to weigh these issues with great care before opting for a course that we believe is not in the best interest of Utah's children. This is especially true now, when the need to raise standards and hold schools and districts accountable for meeting these standards is more critical than ever.

As you know, the nation's federal investment in education historically has been targeted to provide resources to our children greatest in need. As noted above, for the 2002-03 school year, the total amount of ESEA funds available for Utah was approximately \$107 million. If Utah, as a State, declined to accept future federal support offered through ESEA, districts would also not receive formula funds offered through ESEA. The achievement gap, which persists among Utah's students, would certainly continue if the State rejects resources devoted to help struggling students.

If Utah elected to forfeit only its Title I funds (approximately \$46 million in 2003), the state administrative set-aside (1% of the total Title I allocation) that is used to support staff and statewide activities would be forfeited. Even so, State action to reject ESEA formula funds would not jeopardize Utah's or its districts' ability to apply for discretionary funding (such as the

Teaching of Traditional American History, Magnet Schools, or the Voluntary Public School Choice program). The rejection of State Title I funds would result in serious consequences to other programs. The formulas for programs like Educational Technology State Grants, Safe and Drug Free Schools, and 21st Century Community Learning Centers are driven, in part, by Title I. Thus, if Title I funds are declined, these programs would be severely affected at the State level and, as a result, at the district level. A similar situation unfolds if districts wish to decline only Title I funds.

Additionally, districts that reject ESEA formula funds (when the State of Utah accepts these funds) would still need to implement several key aspects of NCLB. These include assessing whether students can read and do math on grade level in grades 3-8 and high school, reviewing whether each school has made adequate yearly progress, and ensuring that teachers of core academic subjects are highly qualified.

Following are responses to your specific questions. For purposes of this letter, where your questions refer to NCLB, I have assumed your intent was to refer to the ESEA as amended by NCLB.

- 1. If Utah does not participate in [ESEA], is the state still eligible to receive other federal funds for education, such as Carl Perkins, adult education, IDEA, and USDA Child Nutrition?*

Nonparticipation by Utah in programs under the ESEA does not disqualify it from receiving funds under the Carl D. Perkins Vocational and Technical Education Act, the Adult Education and Family Literacy Act, and the Individuals with Disabilities Education Act (IDEA). Although we do not administer the Richard B. Russell National School Lunch Act, it is our understanding that Utah's eligibility would not be affected by nonparticipation in ESEA programs.

- 2. Would Utah's nonparticipation in [ESEA] impact any formula allocations of federal funds authorized outside of [ESEA]?*

Generally no, at least with respect to programs administered by our Department. If Utah does not participate in Title I, Part A, however, its funds under Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act would be affected because Utah's allocation under McKinney-Vento is dependent upon its relative share of Title I, Part A funds (see question 4 below).

- 3. If the state did not participate in [ESEA] formula funds, would it be eligible to apply for discretionary funds, and what would be the federal requirements upon the state if such were possible?*

If Utah does not participate in the ESEA state-administered formula grant programs, it may still apply for discretionary grant funds, assuming it otherwise meets the requirements of an eligible applicant for the particular discretionary grant program. The federal requirements would be whatever requirements are included in the respective program's statute, regulations and applicable notices. In addition, the requirements of equal access to Boy Scouts and other similar groups for meetings (20 U.S.C. § 7905) would apply to the Utah State educational agency, or any local educational agency or public school in Utah if it accepts *any* funds provided through the Department and the requirements regarding unsafe school choice (20 U.S.C. § 7912) would apply if Utah accepts *any* ESEA funds, including discretionary grant funds.

4. *Could the state opt out of one or more titles of [ESEA] without opting out of the entire act, and what would be the federal requirements upon the state with regard to any titles in which it could continue participation?*

Utah may choose not to participate in one or more titles of the ESEA. Utah's nonparticipation under Title I, Part A, however, would have serious consequences for funding under other ESEA programs. For example, a number of the formulas for allocating federal funds are linked to the State's funding under the Title I, Part A program. As a result, if Utah chooses not to participate under Title I, Part A, Utah's formula funds under the following programs would be negatively affected:

- Even Start (Title I, Part B, Subpart 3)
- Comprehensive School Reform (Title I, Part F)
- State and Local Technology Grants (Title II, Part D, Subpart 1)
- Safe and Drug Free Schools and Communities (Title IV, Part A)
- 21st Century Community Learning Centers (Title IV, Part B)
- Education for Homeless Children and Youth (Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act)

Of course, if Utah does not receive funds under these programs, its local educational agencies (LEAs) would also not be able to participate.

As noted above, if Utah participates in *any* ESEA program, it must implement the unsafe school choice provisions (20 U.S.C. § 7912). Moreover, if the Utah State educational agency or any local educational agency or public school in Utah accepts *any* funds provided through the Department, it would be subject to the requirements of equal access to Boy Scouts and other similar groups for meetings (20 U.S.C. § 7905).

5. *May an individual school district or charter school opt out of participating in [ESEA] and the related funding?*

As was the case for ESEA programs prior to NCLB, an individual school district may choose not to accept funds under one or more titles of the ESEA. If Utah participates under Title I,

Part A, however, and a school district nevertheless chooses not to accept Title I, Part A funds, Utah is required – as a result of Utah’s receipt of Title I, Part A funds – to ensure that such school district complies with certain ESEA provisions. These provisions include: (1) assessing all students in reading/language arts and mathematics in grades 3-8 and grade span 10-12 (20 U.S.C. § 6311(b)(3)); (2) making adequate yearly progress determinations for all schools (20 U.S.C. § 6311(b)(2)); and (3) ensuring that all teachers teaching core academic subjects are highly qualified by the end of the 2005-2006 school year (20 U.S.C. § 6319).

If a school district accepts *any* ESEA funds, the school district must comply with the military recruitment provisions (20 U.S.C. § 7908); certify that it has no policies interfering with constitutionally protected prayer (20 U.S.C. § 7904); and implement the unsafe school choice provisions (20 U.S.C. § 7912).

In addition, if a school district or public school receives *any* funds through our Department, the school district or school must provide equal access to Boy Scouts or other similar groups for meetings (20 U.S.C. § 7905).

If Utah state law considers a charter school to be an LEA, then the above analysis with respect to school districts would apply. If Utah state law considers a charter school to be a school within a traditional school district, then the decision of whether or not to participate in one or more titles of the ESEA is a decision of the school district, not of the charter school.

6. *If an individual school district or charter school does opt out of [ESEA], are other federal funds still available to that district or charter school?*

If an individual school district chooses not to participate in programs under the ESEA, such nonparticipation does not disqualify the district from receiving funds under the Carl D. Perkins Vocational and Technical Education Act, the Adult Education and Family Literacy Act, the IDEA, and the McKinney-Vento Homeless Assistance Act. As stated above, although we do not administer the Richard B. Russell National School Lunch Act, it is our understanding that a district’s eligibility would not be affected by nonparticipation in ESEA programs.

7. *May an individual school district or charter school opt out of individual titles within [ESEA] and still participate in others? If so, are there any unique conditions the school district or charter school must follow other than those directly related to the titles in which participation continues?*

As was the case for ESEA programs prior to NCLB, an individual school district may choose not to participate in one or more titles of the ESEA. A district’s nonparticipation under Title I, Part A, however, would have serious consequences for funding under other ESEA programs. As noted above, a number of the formulas for allocating federal funds are based,

in part, on funding for the district under the Title I, Part A program. Therefore, if a district does not participate in Title I, Part A, its funding under other programs would be affected. For example, 60 percent of an LEA's allocation under the Safe and Drug Free Schools and Communities Act (SDFSCA) is based on how much Title I, Part A funds the LEA received. If an LEA received no Title I, Part A funds, its allocation under SDFSCA would be significantly reduced. Allocations under the following programs are based, in part, on Title I, Part A:

- Reading First (Title I, Part B, Subpart 1)
- Education Technology Grants (Title II, Part D, Subpart 1)
- Safe and Drug Free Schools and Communities (Title IV, Part A)
- 21st Century Community Learning Centers (Title IV, Part B) (competitive priority)

Please refer to the answer to question 5 for a summary of other provisions that would apply, depending on the particular programs in which a school district participates.

These answers are provided as technical assistance to you and not as a formal legal opinion. Each program, both within and outside our Department, must be reviewed to determine whether any of the respective program's requirements are linked to or otherwise reference requirements of the ESEA. I would encourage you or counsel to the Utah Department of Education to review thoroughly relevant program statutes in the ESEA and other acts prior to making any decisions.

Under NCLB, funding for students in our nation's elementary and secondary schools is at an all-time high. Despite all the priorities competing for our tax dollars – strengthening our economy, defending our nation, and expanding opportunities for all Americans – the President's budget boosts education funding to \$57.3 billion. In 2003, Utah received approximately \$215 million dollars in federal funding for kindergarten through twelfth grade programs. As an example, Utah received \$4.8 million for Reading First, \$18.5 million to attract and retain highly-qualified teachers, and \$5 million for annual assessments.

As we've done in the past, the Department stands ready to grant as much flexibility as possible for Utah in implementing this law. We are also happy to provide technical assistance to Utah. If you have questions about these responses or if I may be of additional assistance, please do not hesitate to contact me.

Sincerely,

Eugene W. Hickok
Acting Deputy Secretary